APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12546

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
PETERSBURG TELEVISION CORPORATION, INTERVENOR

Appeal from the Federal Communications Commission

Decided December 29, 1955

* * * * * * * * * * *

Before EDGERTON, Chief Judge and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PER CURIAM: The appellant and the intervenor each applied to the Federal Communications Commission for a construction permit for a television station in Petersburg, Virginia. After a comparative hearing the Commission denied the appellant's application and granted the intervenor's. We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants.

Affirmed.

* * * * * * * * * * *

Filed Dec. 29, 1955

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in this case be, and the same is hereby, affirmed.

Dated: December 29, 1955.

Per Curiam.

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IN THE

Supreme Court of the United States

October Term, 1955

No.

SOUTHSIDE VIRGINIA TELECASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETERSBURG TELEVISION CORPORATION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is printed as Appendix A to the Petition for a Writ of Certiorari. It has not been reported.

JURISDICTION

The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

QUESTION PRESENTED

The Petitioner states the question before this Court to be whether the Federal Communications Commission, in rendering a decision after hearing based upon substantial evidence on the whole record, "may disregard positive and credited testimony as entitled to no weight." Respondent asserts that the decision of the Court below does not present this question for review on certiorari but rather the question of whether this Court will review and disturb the decisions of the administrative agency and the Court below upon a substantial evidence question.

STATUTES INVOLVED

The Petition for a Writ of Certiorari sets out the sections of the Communications Act of 1934, as amended, and of the Administrative Procedure Act which the Petitioner alleges to be relevant.

STATEMENT

Petitioner and Respondent, Petersburg Television Corporation, filed mutually conflicting applications for permits to construct a television station on Channel 8 in Petersburg, Virginia. Both applicants proposed to locate their studios in Petersburg, a city of 36,000 population, and to serve Petersburg as the "principal community" to which the channel had been allocated by the Federal Communications Commission. Both, however, located their antenna and transmitter sites to the north of Petersburg in the direction of Rich-

mond, which lies 23 miles north of Petersburg. In fact, Petitioner's transmitter site was only three tenths of one mile farther from Richmond than was Respondent's site (R. 317). With the transmitter sites so located, both of the proposed stations would provide service to Richmond and its surrounding area as well as to Petersburg and its surrounding area. To this extent the proposals of Petitioner and Respondent were quite similar.

However, in the matters of programming and preparation to serve the needs of the areas to be served, the similarity between the applications ended. Petitioner's president, Mr. Peterson, testified that Petitioner's proposed station would place "primary" emphasis in its programming upon roughly the southern half of its proposed service area—the area commonly known as "Southside Virginia", while giving "secondary" attention to the northern half of Petitioner's service area, including Richmond (R. 304).

Other portions of Peterson's testimony made it clear, however, that only to the extent that the Richmond stations might fail for some reason to serve the needs of the northern half of Petitioner's service area would Petitioner propose programs to meet those needs (R. 304). Moreover, the record showed that none of Petitioner's proposed programs, except those which were state or national in scope, was designed to serve the particular needs of the communities in the northern half of the service area. On the contrary, they were all tailored to serve Petersburg and the southern half of the service area—"Southside Virginia" (R. 304-6, 322). Further, the record clearly demonstrated that in making preparations for its programming, Petitioner had made program contacts in Petersburg and

the southern half of its service area but had made no contacts at all in the many communities in the northern half of its service area (R. 304-306).

In sharp contrast, Respondent, Petersburg Television Corporation, proposed to serve the needs of its entire service area, including Petersburg, Richmond and the many small communities in both the northern and southern segments. Moreover, Respondent designed its programming for the entire area and made program contacts throughout the entire area (R. 292-293, 322-325).

Upon all of these facts and giving full and detailed consideration to the differing service philosophies of the two applicants, the Commission concluded that, in the public interest, it must choose the applicant (Respondent) who proposed to make the full use of the facility awarded to it by serving the needs of the entire area capable of receiving its signal as against the applicant (Petitioner) who proposed to serve the needs of only half of its service area (R. 322-26, 331).

In reaching this conclusion, the Commission, upon a weighing of all the evidence of record, found that it could not attach weight to Mr. Peterson's general professions to the effect that Petitioner would give "secondary" attention to the northern sector in view of the contradictory evidence demonstrating that none of Petitioner's programs was particularly designed for the northern sector and that no program contacts were made by Petitioner in that sector (R. 305). For, despite Peterson's assertion that Petitioner would "emphasize" service to Southside Virginia, the other evidence of record made it clear that Peterson's service equation was one of "emphasis" *over nothing*

which, in effect, equalled "disregard" of the needs of the northern sector.

Following the Commission's final decision on September 29, 1954 (R. 282-332), favoring Respondent and denying Petitioner's application, Petitioner requested rehearing before the Commission. This was denied by the Commission's Memorandum Opinion and Order of December 27, 1954 (R. 336-43) in which the Commission once again reviewed all of the evidence of record, including that evidence which Petitioner then asserted had been ignored by the Commission,—the same evidence which Petitioner now insists in its Petition for Certiorari was ignored by the Commission.

Thereafter, Petitioner filed its appeal in the United States Court of Appeals for the District of Columbia Circuit. Respondent intervened in that action. In its Brief and oral argument before that Court, Petitioner once more urged that the Commission had disregarded and ignored what Petitioner considered to be "uncontradicted" evidence. In the Brief, Joint Appendix and oral argument submitted by Petitioner to the Court of Appeals that evidence and the Commission's treatment of it was set forth and delineated in great detail. But the Court of Appeals could not agree with Petitioner and, in a unanimous *per curiam* decision, dated December 29, 1955, affirmed the Commission, holding: "We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants." (See Appendix A to Petition for Writ of Certiorari.)

REASONS FOR DENYING THE WRIT

The only question presented by this case is whether the Federal Communications Commission, after a full evidentiary hearing, acted in accordance with the substantial evidence of record. It does not present the question urged by Petitioner as to whether an administrative agency may refuse to give weight to uncontradicted testimony. The Commission here considered the evidence which Petitioner alleges it ignored and found it to be contradicted by the other evidence of record. The Court below reviewed the Commission's actions and concluded that it had not ignored factors requiring consideration. The decision below does not present a conflict with the decisions of other circuits nor does it present a question of such public importance as to merit or require the exercise of discretion by this Court in reviewing the decision upon certiorari.

ARGUMENT

Petitioner would have this Court believe that the effect of the decision of the Court below is a ruling by that Court that the Commmission has the power to disregard positive, credited and uncontradicted evidence. This result, Petitioner asserts, conflicts with the rulings of other circuits on the point.

But Petitioner's argument begs the question by assuming that the evidence was, in fact, "uncontradicted" and was, in fact, "disregarded". Both the Commission's carefully delineated final decision and its memorandum opinion and order denying rehearing reviewed and fully considered the evidence which Petitioner asserts it disregarded. Further, having so considered that evidence in the light of the other contra-

dictory evidence of record, the Commission found and concluded that it was, in fact, contradicted by the other evidence of record. In so doing, the Commission followed this Court's admonition in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488, that "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

An examination of excerpts from the Commission's final decision and its later opinion denying rehearing leaves no doubt as to the Commission's consideration of the evidence and as to the basis for its conclusion. In its final decision of September 29, 1954, the Commission said (R. 303-305):

> "19. Southside's programming proposal shows a marked difference in service philosophy from that of PTC. Its president, Peterson, stated that Southside 'will be principally concerned with serving the needs of the City of Petersburg and the Southside [area] as distinguished from the City of Richmond and the area [north] of Southside' (Tr. 759-760). It is Mr. Peterson's view that there are distinct differences between the needs of the public of Richmond and the northern Virginia counties in the service area as distinguished from the needs of Petersburg and the Southside Virginia area. It will be Southside's purpose to fill the needs of the latter area on the assumption that Richmond stations will serve the needs of that community and the northern counties. This assumption applies to all categories of programs—entertainment, agricultural, educational, religious, news, discussion and talks. The record indicates that only to the extent that the Richmond stations should fail to serve such needs would Southside propose to program its station to meet those needs.
>
> 20. It is important that we delineate carefully our finding here. We have noted the testimony of

Peterson that Southside will not ignore the roughly northern half of its service area but will only relegate it to a secondary role (Tr. 618, 759-760, 711). But the record does not support Peterson's assertions here. Although Southside made rather complete preparations for its programming proposal in the Petersburg and Southside Virginia area, no contacts at all were made in the area north of Southside Virginia (see par. 21, *infra*). Communities such as Powhatan, Surry, Amelia, Richmond, Goochland, King and Queen, Ellerson, all of which were contacted by PTC, were ignored by Southside. Since WSSV does not serve that area (see par. 28, *infra*), it follows that Southside's programming schedule was made up without any knowledge or specfiic regard for that area's needs or desires. Indeed, the Examiner found that 'the evidence shows that all of [Southside's] programs are designed for Petersburg and the so-called Southside Virginia area and give no heed to the area North of the James River (which includes the City of Richmond) nor to the area East and West of the counties included in Southside Virginia, except as to those matters relating to state and national activities which arise in Richmond and in which, in the judgment of the applicant's management, the people of Petersburg and the surrounding area would be interested.' * * * In our recent *Tampa Times* decision (FCC 54-1132), we stressed the importance of the programming proposal, since it is by that proposal that we can judge the applicant's concept of the needs of the area and his service philosophy. The proposal and the nature of the preparation behind it represent the applicant's concept of service philosophy and of how his station should be programmed. As such, it completely overrides general professions by the parties of 'good programming', 'fulfillment of the area's needs', and 'service to the entire area.' In this case, the proposal,

and particularly the complete lack of program contacts in the roughly northern half of the service area, demonstrate that Southside's service philosophy is to ignore that area, barring the contingency noted in the prior paragraph; in the face of this record, we cannot attach weight to Peterson's general professions on this score."

Thereafter, in its Memorandum Opinion and Order denying Petitioner's request for rehearing, the Commission again reviewed Petitioner's contentions and said (R. 338-339):

"4. Southside also attacks the factual bases on which the service philosophy holding rests. Most of the arguments here made were considered by us in reaching our September 29 decision, and we do not believe repetition of our reasons for rejecting them would serve any useful purpose. We shall, however, briefly touch on some of these contentions and others advanced for the first time. Southside argues that the Commission's finding, that it will ignore the northern half of its coverage area, is contrary to the weight of the evidence. In support, it cites the testimony of its president, Peterson, that Southside intended to serve the southern portion 'on a primary basis' and the northern 'on a secondary basis,' and that if the Richmond stations 'did not supply religious, educational or any public service thing in our area, [Southside] would be glad to do it' (Tr. 764) As to the first point, we noted such testimony at the outset of our discussion in paragraph 20: We reaffirm our conclusion that in the face of Southside's actual proposal and particularly the nature of the preparation made with respect to it, weight cannot be attached to Peterson's general professions on this score. Southside's second point ignores the rationale set out in the prior paragraph—specifically, that it is a matter of provid-

> ing an *additional* outlet or opportunity for local expression in the many small communities in the northern segment. On this score, Southside also argues that PTC's service to the area in question is 'reception' service (or the mere presence of a listenable signal) and not 'transmission' service (or the expression of local interests). But the programming contacts made by PTC in the area (see fn. 18) and the programs planned (see, e.g., 'Chamber of Commerce Round Table,' 'Morning Devotions') show this argument to be without merit."

It is thus clear that the Commission carefully considered Petitioner's evidence and the arguments based thereon—not once, but twice—and concluded that it was outweighed and contradicted by the other evidence of record. Moreover, it should be observed that the contradictory evidence,—in the form of Peterson's testimony, the Petitioner's program plans and program contacts,—went to the exact point which Petitioner asserts it established by "uncontradicted" testimony.

In the light of the foregoing, it is unnecessary for this Court to reach the question of whether the decision of the Court below conflicts with the rulings of other circuits on the question presented by Petitioner—whether administrative agencies may refuse to give weight to uncontradicted testimony. For it is clear that the decision below cannot stand for the proposition which Petitioner attributes to it. The Commission considered Peterson's testimony and the other evidence relied upon by Petitioner and found it to be contradicted by other evidence of record. The Court of Appeals reviewed the Commission's decision based upon the evidence and concluded that the Com-

mission had not "ignored factors requiring consideration."

The decision below can therefore only stand as a ruling in a substantial evidence case in which the Court concluded that the Commission had not acted arbitrarily upon the entire evidence of record. It cannot, by any stretch of the imagination, be construed as a ruling that an administrative agency may disregard uncontradicted evidence.

CONCLUSION

Under the above circumstances, the decision below cannot be construed as presenting a conflict with the decisions of other circuits or as presenting a question of the type and importance which merits or requires the review of this Court. The writ requested by Petitioner should therefore not issue.

Respectfully submitted,

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